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IN THE

Supreme Court of the United States

..... Term, 1948

No. 148...

GUY A. THOMPSON, TRUSTEE, FOR MISSOURI PACIFIC RAILWAY COMPANY, AND SYSTEM FEDERATION No. 2 OF RAILWAY EMPLOYES' DEPARTMENT OF AMERICAN FEDERATION OF LABOR, AND J. J. BYRNE, PRESIDENT OF SAID SYSTEM FEDERATION,

Petitioners,

vs.

JOSEPH L. SPEARMON, SAMUEL J. RHODES, AND G. T. HOLMES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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IN THE

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No. .....

GUY A. THOMPSON; TRUSTEE, FOR MISSOURI PACIFIC RAILWAY COMPANY, AND SYSTEM FEDERATION NO. 2 OF RAILWAY EMPLOYES' DEPARTMENT OF AMERICAN FEDERATION OF LABOR, AND J. J. BYRNES, PRESIDENT OF SAID SYSTEM FEDERATION,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioners herein pray that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit, entered April 19, 1948, reversing the judgment of the District Court of the United States for the Eatsern District of Arkansas, which dismissed the petition of respondents, and remanding the case with directions for the entry of judgment in favor of respondents.

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit (R. 95) was handed down on April 19, 1948, and is reported in 167 F. (2d) 626. Rehearing was denied by the Circuit Court of Appeals on June 1, 1948. (R. 119.)* The opinion of the United States District Court for the Eastern District of Arkansas (R. 70) has not yet been officially reported.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Eighth Circuit sought to be reviewed was entered on April 19, 1948 (R. 105). The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by Act of February 13, 1925 (28 U. S. C. 347).

QUESTIONS PRESENTED

1. Whether the provisions of Section 8 of the Selective Training and Service Act of 1940, as amended, require that in the case of veterans entitled to be restored to positions in private employment, military service be accepted as a substitute for actual working experience in private employment, so as to entitle such veterans to positions for which they have not qualified, but for which they would have been able to qualify had they remained in active service in

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* In connection with its denial of a rehearing, the Court of Appeals below modified its opinion so that the first complete paragraph in the second column at 167 F. (2d), page 630, now reads as follows: "Paragraph 1 of the July 1st agreement does not contain any requirement for 'qualification'. As heretofore noted, it simply provides that helpers and apprentices may be advanced to mechanics when others who have already attained that classification, nomenclatured as 'qualified mechanics,' are not available."

such private employment for a specified period of time instead of entering the armed forces.

2. Whether temporary assignment to or employment in work of a permanent nature, pending a reduction in the amount of such work or availability of individuals possessing certain prescribed qualifications for the performance of such work, constitutes a position other than a temporary position within the meaning of Section 8 (b) of the Selective Training and Service Act of 1940, as amended.

3. Whether, in the case of veterans who, prior to their entry into the armed forces, were temporarily assigned to work other than their regular work, and who were reemployed in such temporary assignments upon their return from the armed forces, a demotion or reduction from such temporary assignments to their regular work, upon the happening of certain contingencies upon which the temporary assignments had been conditioned, constitutes a discharge without cause within the meaning of Section 8 (c) of the Selective Training and Service Act of 1940, as amended.

4. Whether a collective bargaining agreement negotiated in accordance with the provisions of the Railway Labor Act is rendered invalid by the provisions of the Selective Training and Service Act of 1940, as amended, where such agreement conditions the acquisition of seniority rights and permanent classification in a particular type of work upon performance of actual service in such work on a temporary basis for a specified period, so that employees entering the armed forces were unable to achieve such seniority rights and permanent classification, although they would have been able to do so had they remained in private employment, and employees who did not enter the armed forces did achieve such rights and classification.

GROUNDS FOR APPLYING FOR WRIT

1. This case involves important questions of Federal law which have not been, but should be, settled by this Court. The collective bargaining agreement in question sets up a system of seniority rights, temporary upgrading and promotion of employees which in principle has been adopted on numerous railroads throughout this country, and the question of its validity involves the employment rights of thousands of railroad workers. The questions concerning the interpretation to be accorded to the Selective Training and Service Act of 1940, as amended, involve the employment rights of war veterans and their fellow employees in practically every industry in the country, and a determination of these questions is of vital and immediate importance to employers, employees, and their representatives.

2. The United States Circuit Court of Appeals for the Eighth Circuit has rendered a decision in conflict with the decisions of this Court and of other circuit courts of appeals on the questions here involved.

3. The decision of the United States Circuit Court of Appeals for the Eighth Circuit is in conflict with the decision of this Court in the case of *Fishgold vs. Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 66 S. Ct. 1105, 90 L. Ed. 1230, in holding that the effect of the Selective Training and Service Act of 1940, as amended, was to invalidate the system of seniority and promotion rights established pursuant to the Railway Labor Act by the collective bargaining agreements involved in this case.

4. The rights of the petitioners herein, and of railroad companies, their employees, and employee representatives throughout the United States, are seriously impaired by the decision of the United States Circuit Court of Appeals for the Eighth Circuit.

STATUTES INVOLVED

The portions of the Selective Training and Service Act of 1940, as amended (54 Stat. 885, 50 U. S. C. App. Section 301 *et seq.*, amended 56 Stat. 724, 58 Stat. 798), which are pertinent to this case, are as follows:

"Sec. 8 (a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. • • •

"(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service—

"(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority status, and pay, unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; • • •

"(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of active military service, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time

such person was ordered into such service, and shall not be discharged from such position without cause within one year after such restoration."

The Railway Labor Act (45 U. S. C. Sec. 151 *et seq.*) is involved only insofar as the case presents the question of the effect of the Selective Training and Service Act upon agreements negotiated by statutory collective bargaining representatives. No question of interpretation of specific provisions of the Railway Labor Act is presented, and the status of the petitioner System Federation as statutory representative is conceded. (R. 64.)

STATEMENT OF CASE

Respondents are honorably discharged veterans of World War II, and at the time of bringing this suit were employed as carmen helpers by petitioner Railroad Company. They claimed that they were entitled to be assigned to positions as carmen mechanics, with a higher rate of pay, and brought this action to compel the Railroad Company to pay them damages based on the differential in pay between the two positions. Respondents predicated their claim for relief on the provisions of Section 8 of the Selective Training and Service Act of 1940, as amended.

During the entire period of their employment by the Railroad Company, respondents have been members of the craft or class of employees known as carmen. At all times material here, the petitioner System Federation has been the representative of the Railroad Company's carmen for the purpose of collective bargaining under the Railway Labor Act, and as such representative has from time to time entered into agreements with the Railroad Company establishing rates of pay, rules and working conditions for carmen, including the agreements of July 1, 1936 (R. 11-55), and July 1, 1942, (R. 56-61).

At no time during the course of their employment by the Railroad Company did respondents have the status of regular carmen mechanics. Until the negotiation of the agreement of July 1, 1942, respondents were employed as helpers, and were not eligible for employment as mechanics, since the agreement of July 1, 1936 set forth the following qualifications for employment as a carman mechanic:

> "Carmen's Special Rules—Qualifications.
>
> "Rule 116. Any man who has served an apprenticeship, or who has had four years' experience as a carman, and is capable of performing car work, and who with the aid of tools with or without drawing can lay out, build or perform the work of his craft or occupation in a mechanical manner within a reasonable length of time, may qualify as a carman." (R. 47.)

None of the respondents had either served an apprenticeship or had any experience as a carman. (The term "carman" as used in the quoted language refers to a journeyman, also known as a mechanic. The term is also used in the railroad industry to refer to members of the entire carmen's craft or class of employees, including journeymen, apprentices, helpers, helper apprentices, etc. (see R. 47-53).)

Prior to July 1, 1942, not only were respondents ineligible for employment as mechanics, but as helpers they were expressly prohibited by the following provision of the agreement of July 1, 1936 from performing work defined as mechanic's work:

> "Assignment of Work.
>
> "Rule 26. (a) None but mechanics or apprentices regularly employed as such shall do mechanic's work as per special rules of each craft, except foremen at points where no mechanics are employed." (R. 23.)

However, because of the wartime shortage of skilled mechanics in the railroad industry, the Railroad Company was unable to obtain enough men who could meet the qualifications of Rule 116, quoted above, and it was to cope with this situation that the supplemental agreement of July 1, 1942, was consummated. This agreement permitted the temporary assignment to mechanic's work of helpers and other specified employees who did not have the required qualifications for employment as regular mechanics and who had previously been prohibited from performing mechanic's work. It was further provided that helpers thus temporarily advanced or upgraded to service as mechanics would be paid the regular rate of pay for whatever mechanic's work they might be assigned to perform, but would not acquire any seniority as mechanics. They would, however, retain and accumulate seniority in the helper or other classifications from which they had been advanced. It was also provided that when qualified mechanics were available they would be employed in preference to the helpers and others temporarily advanced, in which event, of course, the helpers, still having their helpers' seniority, could return to work on the helpers' jobs to which that seniority entitled them. The same principle was to apply in the event of a reduction of forces, it being provided that the helpers and others temporarily advanced would "be reduced before qualified mechanics are laid off." (R. 58-59, para. 7.)

In addition to the provisions already referred to, the agreement of July 1, 1942, modified the above quoted qualification rule of the July 1, 1936, agreement, so as to make helpers temporarily advanced as aforesaid eligible for permanent assignment as mechanics if they should "during the continuation of this agreement accumulate three years or more service as a mechanic"; and in such event, their seniority as mechanics was to date from the ter-

mination of such three-year period. (R. 59, para. 8.) To achieve such eligibility it was not sufficient that there should be a mere passage of three years' time from the date the helper was temporarily advanced to service as mechanic, but rather it was the practice to require that he perform three years' actual service in the temporary mechanic's position. (R. 68, para. 14.) It was further provided that temporarily advanced helpers who did not elect to accept permanent assignment as mechanics at the expiration of three years' service as aforesaid, would then "revert to their former position of regular helper unless jointly agreed by Shop Superintendent or Master Mechanic and Employes' Local Committee for their continuance in service as a mechanic." (R. 59, para. 8.) An employee electing to accept permanent assignment as a mechanic would thereby lose all his accumulated seniority as a helper, and some employees, rather than do this, elected to revert to their former positions as helpers because they preferred the higher seniority they had in the helpers' positions, with relatively greater security from lay-offs. (R. 67, para. 13.)

Several months after the agreement of July 1, 1942, went into effect, the respondents were temporarily assigned to mechanic's work, and continued in such assignments until their induction into the armed forces. Respondent Rhodes was inducted 25 days after being first assigned to mechanic's work; Holmes, 1 year, 3 months and 28 days after such assignment, and Spearmon, 19 days after such assignment. (R. 69.) Upon their discharge from the armed forces, they were reinstated by the Railroad Company in the same positions which they held at the time of their induction, that is, positions as helpers temporarily assigned, pursuant to the agreement of July 1, 1942, to mechanic's work.

In addition to the respondents, other employees of the Railroad Company were temporarily assigned to mechanic's work, some of them being so assigned at the same time as, or after, the assignment of the respondents. A number of these other employees did not enter the armed forces, performed three years' or more actual service in their temporary assignments, were given permanent classification and seniority as mechanics in accordance with the agreement of July 1, 1942, and forfeited the helpers' seniority which they had previously accumulated. Having thus become permanent or "qualified" mechanics, these men were no longer subject to being "reduced" to helpers under the agreement of July 1, 1942; but they could, of course, be furloughed or laid off, in accordance with their seniority as mechanics, after all temporarily advanced men had been reduced, and would have no further rights as helpers.

On March 30, 1946, the Railroad Company, because of a reduction in forces which applied to carmen, downgraded or "reduced" respondents to their former work as helpers, the positions in which they held seniority and a permanent classification. This was done in accordance with the provisions of the agreement of July 1, 1942. (R. 68, para. 15.) At this time the respondents had not completed three years' actual service in their temporary assignments to mechanic's work, and consequently they had not acquired permanent classifications and seniority as mechanics. Holmes had completed 1 year, 5 months and 23 days' actual service in his temporary assignment, and Rhodes and Spearmon had completed, respectively, 6 months and 10 days, and 1 month and 26 days. (R. 69.) Respondents continued to hold, and were accorded, the same seniority dates, or dates of original employment, as helpers which they had held prior to their induction into

the armed forces, so that their seniority in their permanent helper classifications continued to accumulate both during their service as helpers temporarily assigned to mechanic's work, and during their military service.

Respondents brought this suit, alleging that the Railroad Company had "deprived petitioners of their employment seniority rights and has discharged them without cause from positions to which they were restored after discharge from the armed forces," and in an amendment to their original petition, they asserted "that their upgraded classification should have been made permanent three years after date of such upgrading, including time spent in the armed forces, and that their seniority as carmen should have been fixed as of such date." The System Federation and its President were permitted to intervene, and filed an answer opposing the claims of respondents. There was no dispute as to the facts, and the case was submitted to the District Court solely on the basis of an agreed stipulation of facts. The District Court entered judgment for the defendants, petitioners here, holding that respondents' assignments to mechanic's work were only temporary positions within the meaning of the Selective Training and Service Act; that respondents' positions and seniority as helpers did not entitle them to receive permanent classifications and seniority as mechanics under the job classification and seniority system governing their employment; and that the Act does not require that the honorably discharged veteran be given a better position than that which he occupied prior to his induction unless his contractual seniority rights entitle him to such better position. (R. 80-81.)

The judgment was appealed to the United States Circuit Court of Appeals for the Eighth Circuit, which court, in reversing the judgment of the District Court, held that since the position of mechanic on this Railroad Company

had existed for many years and involved work of a continuing, permanent nature, respondents' assignments to such work were not temporary positions within the meaning of the Selective Training and Service Act (R. 100-101); that therefore respondents were mechanics at the time of their induction, and could not, by reason of the Selective Training and Service Act, be denied seniority as mechanics by the provisions of the collective bargaining agreement setting up the three-year service requirement and providing that seniority and classification as a mechanic could not begin prior to the expiration of the three-year period (R. 101, 102, 103); that such contractual provisions were invalid because they denied ex-servicemen seniority to which they were entitled under the Selective Training and Service Act (R. 101, 103); that respondents accumulated seniority as mechanics during the period of their services in the armed forces which must be credited to them, so that upon their return they were entitled to classification and accumulated seniority as mechanics (R. 104); and that their reduction to positions as helpers had the legal effect of a discharge within one year of their reinstatement (R. 104).

SPECIFICATION OF ERRORS TO BE URGED

The United States Circuit Court of Appeals for the Eighth Circuit erred:

1. In holding that at the time of their induction into the armed forces respondents held permanent positions as carmen mechanics in the employ of the Railroad Company.

2. In holding that the respondents were entitled to accumulate seniority as mechanics during the period of their service in the armed forces, and that the agreement between the Railroad Company and the System Federa-

tion, providing for three years' service on temporary assignments to mechanic's work as a prerequisite to the acquisition of mechanic's classification and seniority, was invalid and in conflict with the provisions of the Selective Training and Service Act.

3. In holding that the Selective Training and Service Act entitled respondents to a seniority status different from that to which they were entitled by the provisions of collective bargaining agreements duly consummated in accordance with the provisions of the Railway Labor Act.

4. In requiring that the time served by respondents in the armed forces be accepted as a substitute for the contractual requirement of actual working experience on temporary assignments to mechanic's work, for the purpose of determining the positions and seniority status to which respondents were entitled to be restored.

5. In holding that the reduction of respondents to positions as helpers constituted a discharge without cause within one year of their reinstatement, in violation of the provisions of the Selective Training and Service Act.

6. In reversing the judgment of the District Court below.

REASONS FOR GRANTING THE WRIT

This case involves several problems of far-reaching importance with respect to the interpretation and application of the Selective Training and Service Act. Numerous federal courts have differed in the determination of these same questions, thus inviting litigation in each new case that arises. This Court has not previously had occasion to pass upon these questions directly, and its decision is essential to the establishment of principles which will eliminate a great amount of new litigation and achieve uniformity in the treatment accorded to returning veterans

with respect to their re-employment rights and the impact of those rights upon their fellow employees.

The basic problems involved in this case may be summarized as follows:

1. What are the factors to be considered in determining and defining the veteran's "position" within the meaning of the Selective Training and Service Act, and particularly in deciding whether the position is temporary or "other than a temporary position"?

2. Does the Selective Training and Service Act relieve the returning veteran from the scope and effect of such conditions and incidents of his position as may be disadvantageous or detrimental to him, such as the obligation to meet contractual requirements as to seniority status, and the prospect of being downgraded to a less remunerative work assignment upon the happening of certain specified conditions?

3. Does the Selective Training and Service Act require that military service be accepted as the equivalent of actual working experience in private employment, and entitle the returning veteran to be accorded the employment rights and status which he could or would have achieved by remaining actively at work in private employment, but which were not achieved by civilian employees on furlough or leave of absence?

We shall refer briefly to the basis on which the Court of Appeals below resolved these problems, and in stating our reasons for believing the decision to be in error, we shall point out the conflict which exists between the decision below and decisions of this Court and of other Circuit Courts of Appeals.

I. NATURE OF THE POSITIONS TO WHICH THE SELECTIVE TRAINING AND SERVICE ACT ENTITLED RESPONDENTS TO BE RESTORED.

The Selective Training and Service Act contains no definition of the word "position" or the phrase "other than a temporary position" as used in the portions of Section 8 of the Act with which we are here concerned. In this case the respondents contended that their assignments to mechanic's work constituted positions other than temporary positions to which they were entitled to be restored. The Railroad Company and the System Federation contended that respondents' positions were positions as helpers, not mechanics, and that their assignments to mechanic's work on a temporary basis, and in accordance with the provisions of the July 1, 1942, agreement, were merely incidents of their positions as helpers; but that in any event, if their positions should be held to consist of their assignments to mechanic's work, then such positions were temporary, within the meaning of the Act. (It should perhaps be noted that it was conceded that respondents held permanent positions as helpers, and that they were restored to and have at all times retained their status as helpers, together with all rights, including accumulated seniority, incident thereto.)

The Court of Appeals below took the view that respondents' assignments to mechanic's work did constitute the positions which they left to enter the armed forces, and ruled that such positions were not temporary within the meaning of the Act. The basis for this conclusion is set forth in the following language in the Court's opinion:

> "We are unable to agree that the positions Spearmon, Rhodes and Holmes left when they were inducted were 'temporary positions' within the meaning of the Act. It is a reasonable assumption that the provision that an ex-serviceman who left a

> temporary position to enter the armed forces should not be entitled to be restored to it upon his return was inserted in the Act to protect an employer from the necessity of creating a useless job to give to a former employee merely because there was a transitory, temporary need for such a job at one time and the ex-serviceman happened to be occupying it at the time of his induction. The position of mechanic, involved here, had been in existence for many years. It was in existence when the contract was made between the System Federation and the Railroad in 1936 and is mentioned in that contract. It continued in existence from that time (and probably from an even earlier date) up to the present time. It apparently still exists * * *." (R. 100-101.)

It is obvious from the quoted language that the Court of Appeals took the view that respondents' positions consisted of the work which they happened to be doing at the time of their induction, and that the character of the work, not respondents' relation to it, determined whether their positions were temporary within the meaning of the Act.

It is our contention that the term "position" as used in the Act contemplates not the particular work performed by the employee, but rather the sum total of the attributes, rights, obligations and liabilities adhering to the relationship of employer and employees, and of employees as among themselves. Considered in this light, it is clear from the provisions of the collective bargaining agreements, which are exclusively controlling as to the terms of respondents' employment (*Order of R. Telegraphers vs. Railway Exp. Agency*, 321 U. S. 342, 64 S. Ct. 582, 88 L. Ed. 788), that respondents' assignments to mechanic's work were but incidents of their positions as helpers, and, moreover, that such assignments were expressly made on a temporary basis, and subject to termination upon the happening of certain conditions which occurred here.

We believe that the holding of the Court of Appeals on this point is in conflict with the decisions of this Court in the cases of *Fishgold vs. Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 66 S. Ct. 1105, 90 L. Ed. 1230, and *Trailmobile Co. vs. Whirls*, 331 U. S. 40, 67 S. Ct. 982, 91 L. Ed. 1328.

In the *Fishgold case*, the Court clearly indicated that "work" was not the criterion of a man's position. Thus, in holding that an employee on furlough or leave of absence still retains his "position," the Court said:

> " * * * His 'position' exists though no work is then available. The slackening of work which causes him to be laid off by operation of a seniority system is neither a removal or dismissal or discharge from the 'position' in any normal sense. * * * " (328 U. S. 275, 288.)

And in the *Trailmobile case*, this court indicated that the position referred to in the Act encompassed not merely bare employment, but all of the "incidents of the employment" as well. Thus, in rejecting the argument advanced by the Government on behalf of the veteran in that case, the court said:

> "The real trouble however is in the basic premise both grammatically and substantively. It assumes not only the complete independence of the last clause of Section 8 from what precedes, but also that employment within the meaning of the Act is something wholly distinct and separate from its incidents, including seniority, rates of pay, etc. * * * " (331 U. S. 40, 55.)

The decision of the Court of Appeals below on the point under discussion is also in conflict with the holdings of other Circuit Courts of Appeals on the same subject. In the case of *Lesher vs. Mallory & Co.*, 166 F. (2d) 983, decided February 4, 1948, by the Circuit Court of Appeals for the Seventh Circuit, the theory on which the Court of

Appeals below held respondents' assignments to mechanic's work to be other than temporary positions was rejected, as illustrated by the following quotations from the court's opinion:

> "As to the meaning to be attributed to 'a position other than a temporary position,' plaintiff's contend, as we understand, that the controlling words of this phrase are 'a position,' and that if the position is permanent it is immaterial as to the relation which the employee sustains thereto. In other words, if a position is permanent, the employment is not temporary, regardless of its character. On the other hand, it is defendant's contention that the controlling factor is the employment relationship, even though the position itself may be permanent. * * *
>
> "The interpretation to be given to the words 'temporary position' has been considered by a number of courts. It has been held that the word 'position' means the employment and not the particular job the employee was performing. * * * " (Pages 985, 986.)

Finally, the case of *Boston & Maine R. R. vs. David*, 167 F. (2d) 722, decided May 5, 1948, by the Circuit Court of Appeals for the First Circuit, held against the petitioner veteran on the basis of a factual situation which, insofar as the issues presented are concerned, is identical with that involved in the instant case. There, as here, the veteran had been upgraded from a helper's position and temporarily assigned to the performance of mechanic's work, pursuant to a collective bargaining agreement between the railroad and the system federation which was the representative of its employees. The court rejected his claim to be continued in the mechanic's work upon his return from the armed forces, in preference to another employee who was a qualified mechanic, in accordance with the requirements of the collective bargaining agreements, but who had been employed subsequent to the veteran's

temporary assignment to mechanic's work. The following language from the court's opinion would be equally applicable to the facts here involved:

> "The petitioner was not qualified for the status of mechanic. His permanent status was only that of helper, and under the agreements seniority does not cross craft lines but is in status. Furthermore under the agreements the petitioner as a helper did not have any right to be assigned to a mechanic's work when mechanics were available to do it, their superior status carrying with it superior rights to employment. Thus it was a misconception to conclude simply because sheet metal work was being done by mechanics in the respondent's shops, even by a mechanic junior to petitioner on that work, that the petitioner was entitled to reemployment. He is entitled to be given employment on sheet metal work only when such work becomes available to one in his status and in his position in the framework of seniority in the respondent's shops. * * * " (Page 726.)

II. OBLIGATION OF RETURNING VETERAN TO COMPLY WITH DISADVANTAGEOUS CONDITIONS AND REQUIREMENTS OF COLLECTIVE BARGAINING AGREEMENTS.

It should be stated at the outset that it is not disputed that prior to their induction into the armed forces the respondents were bound by the conditions and requirments of the collective bargaining agreements here involved, including the required qualifications for the achievement of permanent classification and seniority in the position of mechanic which they claim. It should also be noted that this case does not involve any element of discrimination against veterans or juggling of contract provisions so as to deny to the veterans benefits given to other employees. The agreement of July 1, 1942, setting up the system of

temporary assignment of helpers and others to mechanic's work and the requirement of three years' actual service in the temporary assignments as a condition or qualification for permanent mechanic's classification, was in effect prior to the time respondents left their positions to enter the armed forces. And prior to the July 1, 1942 agreement, the more stringent qualification requirements of the July 1, 1936 agreement were in effect. (The latter agreement prohibited the performance of mechanic's work by all except those employees who had qualified either by serving an apprenticeship or by accumulating four years' experience at mechanic's work.)

The Court of Appeals below nevertheless held invalid the requirement of three years' service contained in the July 1, 1942 agreement. The court apparently proceeded on the theory that since respondents were performing mechanic's work at the time of their induction into the armed forces, the Selective Training and Service Act somehow rendered void any condition such as that imposed by the agreement in question to the effect that they could not be classified and given seniority as mechanics until they had served for three years in the temporary assignments to mechanic's work. (The court's holding on this point is, incidentally, inconsistent with the respondents' claim, set forth in the amendment to the prayer of their petition—R. 62—that "their seniority date as carmen can be fixed as of three years after upgrading date.") The holding on this point appears in the following language of the opinion of the Court of Appeals below:

> "But the more troublesome question remains as to whether appellants were entitled to have the time they spent with the armed forces applied toward seniority in the mechanic's classification or merely as helpers. Much stress is placed by appellees upon the contractual provision contained in paragraph 8 of the July 1 agreement, heretofore quoted, that seni-

> ority as a mechanic should not begin until three years' service had been accumulated in the position of mechanic. But a contractual provision denying an ex-serviceman seniority to which he is entitled under the Selective Training and Service Act is invalid. * * * The contract therefore cannot deprive appellants of their seniority as mechanics if in fact they were mechanics at the time of their induction. * * * " (R. 101-102.)
>
> " * * * Nor does the stipulated fact that it was the practice 'to require three years' actual service in the temporary position before making the temporary classification permanent,' aid appellees. The practice referred to was the practice contemplated by the contract. If the contract contemplated a deprivation of ex-servicemen's rights under the Act of Congress, the following of the illegal practice will not clothe the contract or the practice with legality." (R. 103.)

In arriving at this holding, the Court of Appeals below apparently attached great significance to its conclusion that "proficiency" was not the test contemplated by the contract as a prerequisite for advancement from the position of helper to mechanic, and implicit in the court's opinion is the conclusion that no other type of prerequisite could validly be imposed. It is our position that the prerequisite imposed by the agreements in question was the completion of three years' actual work on temporary assignments to mechanic's work, and that this uniformly applicable requirement was imposed *in lieu of* a system whereby each individual employee would have to establish his personal proficiency to the satisfaction of his superiors. If such a requirement is invalid, then all requirements for the serving of an apprenticeship or other specified period of job training would be equally improper and unlawful.

We do not believe that it was the intent of Congress in enacting the Selective Training and Service Act to in-

validate systems of promotion and seniority rights set up by otherwise valid collective bargaining agreements, nor to restore the returning veteran to his former position free from all the attributes which it had, when he left it, except those beneficial to him. Moreover, the Act does not attach to the returning veteran's position any new or different rights or attributes which it did not have when he left it. The collective bargaining agreements here involved are the only source for any seniority rights which respondents possessed at the time they entered the armed forces (*Trailmobile Co. vs Whirls, supra*, 331 U. S. 40, 53, footnote 21, and authorities cited), and under the agreements they had no seniority and classification as mechanics, and could only achieve such seniority and classification by three years' actual service in their temporary assignments.

In view of the above considerations, it would appear that the reasoning of the Court of Appeals below was directly at odds with this court's statement in the *Fishgold case, supra*, that:

> " * * * Congress recognized in the Act the existence of seniority systems and seniority rights. It sought to preserve the veteran's rights under those systems and to protect him against loss under them by reason of his absence. There is indeed no suggestion that Congress sought to sweep aside the seniority system. What it undertook to do was to give the veteran protection within the framework of the seniority system plus a guarantee against demotion or termination of the employment relationship without cause for a year. * * * " (328 U. S. 275, 288.)

It is evident that the decision of the Court of Appeals below is directly in conflict with the decision of the Circuit Court of Appeals for the First Circuit in the case of *Boston & Maine R. R. vs. David, supra*, on the point under discussion. Both cases present the same issues on prac-

tically identical facts, as is evident from the discussion and quotation from the *Boston & Maine case* appearing at pages 18 and 19 above.

The Circuit Court of Appeals for the Second Circuit has also held that the reemployed veteran is subject to the same conditions and requirements which were a part of the position he left to enter the armed forces. Thus, in the case of *Feore vs. North Shore Bus Co.*, 161 F. (2d) 552, that court said:

> "* * * Among the conditions of plaintiff's prewar job were the union contract and the seniority and quarterly pick systems. He had no cause for complaint under the statute when these same conditions were present in the postwar job offered him." (Page 554.)

The case of *Gauweiler vs. Elastic Stop Nut Corp.*, 162 F. (2d) 448, decided by the Circuit Court of Appeals for the Third Circuit, also supports the proposition that the Selective Training and Service Act does not confer upon the returning veteran other or different seniority rights than those to which he is entitled under an applicable collective bargaining agreement, even where the provision of which the veteran complained was put into effect during his absence in the armed forces.

The decision of the Court of Appeals below also is in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in the case of *Lesher vs. Mallory & Co., supra,* which held the returning veterans bound by a provision in the union agreement setting up a probationary period during which they should acquire no seniority rights. In that case, the court stated that the Selective Training and Service Act did not "create a status which they never had, even though it might have been attained had they not been called." (166 F. (2d) 983, 986.)

It would thus appear that the holding of the Court of Appeals below to the effect that the Selective Training and Service Act rendered invalid the three years' service requirement of the July 1, 1942 agreement, is clearly in conflict with decisions of this court and of other circuit courts of appeals.

III. IS THE RETURNING VETERAN'S PERIOD OF MILITARY SERVICE TO BE CREDITED AS TIME WORKED IN PRIVATE EMPLOYMENT OR AS TIME SPENT ON FURLOUGH OR LEAVE OF ABSENCE.

It is clear both from the language of the collective bargaining agreements here involved and the stipulation of facts entered into by the parties that the agreements required three years of "actual service" in the employ of the Railroad Company as a condition of achieving classification and seniority as a mechanic. The Court of Appeals below held this requirement invalid, and we have urged that such holding was erroneous. However, assuming the validity of that requirement, this case then presents the further question of whether the Selective Training and Service Act requires that respondents' service in the armed forces be credited toward the fulfillment of this condition of the agreements, so that they must be given the position and seniority rights which they would have been able to achieve had they remained in the active employment of the Railroad Company instead of entering the armed forces.

Although this proposition was urged by respondents before both the District Court and the Court of Appeals below, the Court of Appeals did not have occasion to pass upon it in view of its holding as to the validity of the requirement of the agreement, and the nature of the positions held by respondents at the time of their induction into the armed forces.

The proposition has been urged, in numerous cases involving the reemployment rights of returning veterans, that time spent in the armed forces must be treated as the equivalent of time worked in the plant. It is our position that the Selective Training and Service Act requires the veteran to be considered not as having remained in continuous active employment during his military service, but, in the words of the statute, "as having been on furlough or leave of absence during his period of military service."

The latter view is supported by the decisions of a number of circuit courts of appeals, including two which we have already cited. (*Lesher vs. Mallory & Co., supra*, and *Feore vs. North Shore Bus Co., supra.*)

In the case of *Siaskiewicz vs. General Electric Co.*, 166 F. (2d) 463, the Circuit Court of Appeals for the Second Circuit denied the claims of reemployed veterans for vacation pay for the year of their return from military service, where the union contract required a specified period of active employment as a condition of vacation pay eligibility. The court stated that:

> "* * * under the language of the Act, appellants must be treated like non-veteran employees on furlough or leave of absence. But non-veteran employees of appellee who were on leave of absence for more than half a year would not be entitled to vacation pay for that year. Therefore, appellants are not so entitled * * *." (Pages 465-466.)

A similar case is that of *Dwyer vs. Crosby Co.*, 167 F. (2d) 567, also decided by the Circuit Court of Appeals for the Second Circuit, where the veteran was also denied vacation rights not given to employees who had been on furlough or leave of absence.

In the case of *Harvey vs. Braniff International Airways*, 164 F. (2d) 521, the Circuit Court of Appeals for the Fifth Circuit rejected the contention of reemployed veterans that their time spent in the armed forces must

be credited as time actually worked for their employer. The court said:

> "Since appellants are now first pilots, enjoying all the seniority rights to which they would have been entitled had they not joined the armed forces, have they also the right to base pay figured as though they had actually been first pilots during their time of service? We think not." (Page 521.)

The Circuit Court of Appeals for the Ninth Circuit in the case of *Seattle Star, Inc. vs. Randolph,* ... F. (2d) ..., decided May 26, 1948, and unofficially reported at 22 LRRM 2162*, held that time spent in the armed forces was not to be considered as time worked in private employment for the purpose of computing a reemployed veteran's severance pay. The following statement appears in the court's opinion:

> "It is argued that unless the contract be so interpreted as to permit appellees' time in the armed force to be considered as full time employment, said contract conflicts with Section 8 (c) of the Selective Training and Service Act and is against public policy. Such a contention is diametrically opposed to the plain reading of Section 8 (c) and gives no effect to the requirement that the determination shall be made on the basis of the rules applicable at the time of induction to those on furlough or leave of absence * * *."

And finally, in a recent decision by the Circuit Court of Appeals for the Sixth Circuit, in the cases of *Raulins et al vs. Memphis Union Station Co.,* ... F. (2d) ..., decided June 1, 1948, and unofficially reported at 14 C. C. H. Labor Cases, Par. 64,550, the court made the following statement in rejecting claims of reemployed veterans to

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* LRRM refers to Labor Relations Reference Manual, a publication of the Bureau of National Affairs, Inc., Washington, D. C.

promotions they would have received had they not entered the armed forces:

> "* * * If the appellants had been on furlough or leave of absence, instead of in the service, when the vacancies occurred, they would not have obtained the promotions which they are now claiming. Section 8 of the Act provides that the employee shall be considered as having been on furlough or leave of absence during his period of training. Rule 13 of the collective bargaining agreement, dealing with leave of absence, provided for such a leave for a period not exceeding 30 days with privilege of renewal, but made no provision that an employee who has been absent upon leave may upon returning exercise those rights that would have been available to him if he had not been absent."

Both the language of the Selective Training and Service Act and the authorities cited above refute the contention of respondents herein that the period of their military service must be considered as time worked in the employ of the Railroad Company for the purpose of satisfying the contractual requirement of three years' service in temporary assignments to mechanic's work. It is instead clear that the returning veteran is to be considered as having been on furlough or leave of absence, rather than in active employment, during his military service, and the Court of Appeals below therefore erred in holding for the respondents.

CONCLUSION

The Court of Appeals below held that the respondents, at the time of their induction into the armed forces, held positions "other than temporary" as mechanics, although the controlling collective bargaining agreement specified that their assignments to mechanic's work should be tem-

porary. Such holding was based on the reasoning that since the mechanic's work in question was permanent work, any individual performing it must necessarily hold a permanent position as a mechanic. The court further held that the Selective Training and Service Act rendered invalid provisions in the collective bargaining agreement to the effect that respondents could not achieve classification and seniority as mechanics until they had accumulated three years' service on temporary assignment to mechanic's work. We believe that the court was in error on these points, and we have shown wherein its decision conflicts with decisions of this Court and of other Circuit Courts of Appeals.

The only other theory on which respondents based their claims was the proposition that the Selective Training and Service Act requires that time spent in military service be considered as time actually worked in private employment, so as to enable respondents to meet the three-year service requirement of the agreement. We have pointed out that a decision in favor of respondents on the basis of this proposition would conflict with the express provisions of the Act and with the decisions of other Circuit Courts of Appeals on the same point.

The effect of the decision of the Court of Appeals below, if it should prevail, would be to invalidate collective bargaining agreements on most railroads throughout the country, as well as in many other industries. It would relieve returning veterans in all fields of employment of any obligation which they might otherwise have of accumulating a specified amount of working experience or completing a prescribed period of job training as a prerequisite to promotion to or classification in a particular position, and would completely disrupt apprentice and job training programs.

Therefore, for the reasons stated herein, it is respectfully submitted that this petition for a writ of *certiorari* to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit should be granted.

Respectfully submitted,

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